Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-575

SMITH JOHN and HARRY SMITH JOHN,
Appellants,

v.

STATE OF MISSISSIPPI,
Appellee.

On Appeal From the Supreme Court of Mississippi

JURISDICTIONAL STATEMENT

RICHARD B. COLLINS
NATIVE AMERICAN RIGHTS FUND
1506 Broadway
Boulder, Colorado 80302
Telephone: 303/447-8760

EDWIN R. SMITH
Box 467
Philadelphia, Mississippi 39350
Telephone: 601/565-5251

Counsel for Appellants

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CONTENTS

	Page
OPINION BELOW	2
GROUNDS ON WHICH THE COURT'S JURISDICTION IS INVOLVED	2
QUESTIONS PRESENTED	3
STATEMENT OF THE CASE	4
A. Proceedings Below	4
B. The Related Federal Prosecution	5
C. Background of the Choctaw Indian Reservation	6
THE QUESTIONS ARE SUBSTANTIAL	8
A. Basis of the Decision Below and Related Cases	8
B. The Court Below Ignored the Most Relevant Decisions of This Court	9
C. Re-Establishment of Indian Country Is Not Precluded by the Treaty of Dancing Rabbit Creek	10
D. Citizenship of the Indians Is Irrelevant	10
E. Tribal Status Is Irrelevant	11
F. The Interpretation of the Indian Reorganization Act by the Court Below Is Erroneous, and There Is a Conflict between Federal Circuit Courts of Appeals	12
G. The Arsenals and Dockyards Clause Is Inapplicable	12
H. Federal Jurisdiction Is Exclusive	13
I. The Issues Are Important	13
CONCLUSION	14
APPENDIX	1a
A. Statutes Involved	1a
B. Opinion Below	3a

CASES: Page

Antoine v. Washington, 420 U.S. 194 (1975) 10, 12
Apapas v. United States, 233 U.S. 587 (1914) 11
Baker v. Carr, 369 U.S. 186 (1962) 11
Creek County v. Seber, 318 U.S. 705 (1943) 11
DeCoteau v. District County Court, 420 U.S. 425 (1975) 13
Donnelly v. United States, 228 U.S. 243 (1913) 10
Kennerly v. District Court, 400 U.S. 423 (1971) 13
Lone Wolf v. Hitchcock, 187 U.S. 553 (1903) 10
Maynor v. Morton, 510 F.2d 1254 (D.C.Cir. 1975) 12
McClanahan v. Arizona Tax Com'n, 411 U.S. 164 (1973) 3, 11
Moe v. Confederated Salish & Kootenai Tribes, 425 U.S. 463 (1976) 12
Seymour v. Superintendent, 368 U.S. 351 (1962) 13
Tiger v. Western Investment Co., 221 U.S. 286 (1911) 11
Tonasket v. Washington, 411 U.S. 451 (1973) 3
Tubby v. State, 327 So.2d 272 (Miss. 1976) ...9, 10, 12, 13
United States v. Celestine, 215 U.S. 278 (1909) 11
United States v. Holliday, 70 U.S. (3 Wall) 407 (1865) 11
United States v. Kagama, 118 U.S. 375 (1886) 13
United States v. McGowan, 302 U.S. 535 (1938) 9, 10. 11, 12
United States v. McGowan, 89 F.2d 201 (9th Cir. 1937), *affirmed*, 302 U.S. 535 (1938) 12
United States v. Mississippi Tax Com'n, 505 F.2d 633 (5th Cir. 1974), *rehearing denied*, 535 F.2d 300 (5th Cir. 1976), *rehearing en banc denied*, 541 F.2d 469 (5th Cir. 1976) 9, 10, 12, 13
United States v. Pelican, 232 U.S. 442 (1914) 11
United States v. Ramsey, 271 U.S. 467 (1926) 11
United States v. Sandoval, 231 U.S. 28 (1913) 10
Warren Trading Post Co. v. Arizona Tax Com'n, 380 U.S. 685 (1965) 3
Williams v. Lee, 358 U.S. 217 (1959) 2

CONSTITUTION, TREATIES AND STATUTES:

Const., art. I, § 8, cl. 17 .....4, 12
7 Stat. 333 (1830) 4, 6, 10
40 Stat. 573 (1918) 7
41 Stat. 15 (1919) 7
41 Stat. 420 (1920) 7

Page

41 Stat. 1236 (1921) 7
42 Stat. 570 (1922) 7
42 Stat. 1191 (1923) 7
43 Stat. 1149 (1925) 7
44 Stat. 461 (1926) 7
44 Stat. 941 (1927) 7
45 Stat. 206 (1928) 7
45 Stat. 1568-69 (1929) 7
46 Stat. 286 (1930) 7
46 Stat. 1121 (1931) 7
53 Stat. 851 (1939) 3, 7, 8, 10, 12
67 Stat. 589 (1953), 25 U.S.C. §§ 1321-1326 13
18 U.S.C. § 113(a) 5, 6
18 U.S.C. § 113(e) 6
18 U.S.C. § 1151 .....4, 5, 6, 8, 11, 13
18 U.S.C. § 1153 .....5, 6, 8, 11, 13
18 U.S.C. § 3242 .....5, 8, 11, 13
25 U.S.C. §§ 461-479 ..... 4, 7
25 U.S.C. § 467 .....3, 7, 8, 11
25 U.S.C. § 476 .....8, 12
25 U.S.C. § 477 8
25 U.S.C. § 479 .....3, 12
28 U.S.C. § 1257(1) 2
28 U.S.C. § 1257(2) 2
28 U.S.C. § 1257(3) 2
28 U.S.C. § 2103 2
28 U.S.C. § 2403 3
Miss. Code Ann. § 97-3-7(2) (Supp. 1976) 2, 3

Page

TEXTBOOKS AND OTHER:

F. Cohen, *Handbook of Federal Indian Law* (GPO 1942) 10
L. Davis, *Jurisdiction over Indian Country*, 1 Ariz.L. Rev. 62 (1959) 12
H.Rept. No. 194, 76 Cong. 1st Sess. 7, 8
9 Fed. Reg. 14907 (1944) 8

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-

SMITH JOHN and HARRY SMITH JOHN,
Appellants,

v.

STATE OF MISSISSIPPI,
Appellee.

On Appeal From the Supreme Court of Mississippi

JURISDICTIONAL STATEMENT

Appellants appeal from the judgment of the Supreme Court of Mississippi, entered on May 11, 1977, rehearing denied, July 20, 1977, affirming appellants' conviction and submit this Statement to show that the Supreme Court of the United States has jurisdiction of the appeal and that a substantial question is presented.

OPINION BELOW

The opinion of the Supreme Court of Mississippi is reported at 347 So.2d 959 (Miss. 1977) and is reproduced as an appendix to this Jurisdictional Statement.

GROUNDS ON WHICH THE COURT'S JURISDICTION IS INVOLVED

(i) The proceeding below was a criminal prosecution for aggravated assault pursuant to Miss. Code Ann. sec. 97-3-7(2).

(ii) The decision of the court below was dated and entered on May 11, 1977. Appellants made a timely motion for rehearing, which was denied on July 20, 1977. Appellants' notice of appeal to this Court was filed on October 17, 1977, in the Supreme Court of Mississippi.

(iii) Appellants believe this Court has jurisdiction of this appeal pursuant to 28 U.S.C. § 1257(2) and/or § 1257(1). This matter is not free from doubt, and in the alternative, appellants pray that the Court treat this Jurisdictional Statement as a Petition for Writ of Certiorari pursuant to 28 U.S.C. § 1257(3) and 28 U.S.C. § 2103.[1]

(iv) The following cases are believed to sustain the jurisdiction:

[1] Regarding 28 U.S.C. § 1257(2), although the Indian country jurisdiction cases cited under (iv) *infra* were accepted by the Court as appeals, other Indian jurisdiction cases have been reviewed on certiorari, *e.g.*, Williams v. Lee, 358 U.S. 217 (1959). Regarding 28 U.S.C. § 1257(1), the rulings of the court below invalidating Acts of Congress as applied are not entirely clear.

McClanahan v. Arizona Tax Com'n, 411 U.S. 164 (1973)

Warren Trading Post Co. v. Arizona Tax Com'n, 380 U.S. 685 (1965)

Tonasket v. Washington, 411 U.S. 451 (1973)

(v) The validity of Miss. Code Ann. sec. 97-3-7(2) (Supp. 1976) as applied to appellants is involved. The statute is set out in the Appendix to this Jurisdictional Statement.

As an alternate holding, the court below apparently held two Acts of Congress unconstitutional as applied. One is the Indian Reorganization Act of 1934, particularly 25 U.S.C. §§ 467 and 479. The other is the Act of June 21, 1939, Pub.L. 76-147, 53 Stat. 851.[2] These three sections are set out in the Appendix to this Jurisdictional Statement. Based on this ruling, appellants believe that 28 U.S.C. § 2403 may be applicable, and this statement has therefore been served on the Solicitor General pursuant to Rule 33.2(b).

QUESTIONS PRESENTED

Do the Mississippi State Courts Have Jurisdiction to Try and Convict Choctaw Indians of Aggravated Assault Committed within the Choctaw Indian Reservation in Mississippi?

[2] The court below did not refer to this statute, but the statute was argued to it and is obviously relevant. Under the circumstances, the court must necessarily have ruled on the statute implicitly, particularly by its conclusion that a treaty "cannot be altered by an Act of Congress." 347 So.2d at 962. *See* part C of the Argument *infra*.

A. Is the Choctaw Indian Reservation in Mississippi "Indian country," as that term is used in 18 U.S.C. § 1151?

B. Is the re-establishment of Indian country in Mississippi precluded by:

(1) The Treaty of Dancing Rabbit Creek, 7 Stat. 333 (1830)?

(2) Indian citizenship?

(3) The Tribal Status of the Mississippi Choctaws?

(4) Unlawful Application of the Indian Reorganization Act, 25 U.S.C. §§ 461-479?

(5) The Arsenals and Dockyards Clause of the Constitution, art I, § 8, cl. 17?

STATEMENT OF THE CASE

A. Proceedings Below.

Appellants Smith John and Harry Smith John are full-blooded Mississippi Choctaw Indians, residents of the Choctaw Indian Reservation in Mississippi, and enrolled at the federal Indian Agency at Philadelphia, Mississippi. They were indicted by the Leake County, Mississippi, Grand Jury in April 1976 on the charge of aggravated assault in violation of Miss. Code Ann. sec. 97-3-7(2) (Supp. 1976). They filed motions to dismiss and supporting documents to show that the acts giving rise to the state indictment had occurred in Indian country as defined by 18 U.S.C. § 1151 and that appellants had earlier been indicted, tried and convicted in the United States District Court for the Southern District of Mississippi based on the same acts. They contended that the federal court had ex-

clusive jurisdiction over the alleged offense pursuant to 18 U.S.C. §§ 1151-53 and 3242. They also contended that the State prosecution was unlawful double jeopardy. The motions to dismiss were denied, and appellants were tried before a jury on May 7, 1976. Uncontradicted trial evidence showed that appellants are Choctaw Indians and that the acts forming the basis of the criminal charge against them had occurred within the boundaries of the Choctaw Indian Reservation. Appellants were convicted of aggravated assault and sentenced to two years in the Mississippi State Penitentiary.

Appellants prosecuted an appeal to the Supreme Court of Mississippi, which affirmed their conviction and issued the opinion reproduced in the Appendix to this Jurisdictional Statement. The essential basis of that court's opinion is that the Choctaw Indian Reservation in Mississippi is not Indian country, so the federal district court lacked jurisdiction to try and convict appellants.

B. The Related Federal Prosecution.

The earlier federal indictment was returned in October 1975 and charged that appellants are Indians and committed assault with intent to kill in Indian country in violation of 18 U.S.C. §§ 113(a) and 1153.[3]

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[3] In pertinent part, the federal indictment reads:

The Grand Jury charges:

That SMITH JOHN, an Indian, and HARRY SMITH JOHN, an Indian, on or about August 30, 1975, in Leake County, Mississippi, in the NE 1/4 of Section 35, Township 11 N, Range 7 E, in the Jackson Division of the Southern District of Mississippi on and within the Choctaw Indian Reservation and on land within the Indian country under the jurisdiction of the United States of America, did then and there knowingly, willfully, unlawfully and feloniously

Defendants were tried before a federal trial jury on December 7-8, 1975, based on the same acts as charged in the state court the following year. The jury acquitted appellants of assault with intent to kill but convicted them of the lesser included offense defined by 18 U.S.C. § 113(e). The trial action was numbered Criminal Action No. J-75-68(c), United States District Court for the Southern District of Mississippi, Jackson Division.

Appellants appealed their federal conviction to the United States Court of Appeals for the Fifth Circuit, which heard oral argument on October 4, 1976. No decision has been made of that appeal as this is written.[4] The case in that court is numbered 76-1518.

C. Background of the Choctaw Indian Reservation.

The underlying question in this case is whether the federal actions establishing the Choctaw Indian Reservation in Mississippi were sufficient to establish Indian country as defined by 18 U.S.C. § 1151. These actions may be quickly summarized.

In 1830 the Choctaw Tribe entered into the Treaty of Dancing Rabbit Creek with the United States, 7 Stat. 333 (1830). By the Treaty, the Tribe ceded all tribal lands in Mississippi. Choctaws were given the option of removing to Indian Territory or remaining in Mississippi. Article XIV of the Treaty provided to

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assault with intent to kill the person of Artis Jenkins, in violation of Sections 1153 and 113(a), Title 18, United States Code.

[4] Just as this Statement was being sent to the printers, counsel was informed by telephone that the Fifth Circuit decided this appeal on October 11, 1977, and ruled against federal jurisdiction. Counsel has not yet seen the opinion.

each Choctaw family remaining in Mississippi a "reservation" of one section of land. The Mississippi Choctaws were made U.S. citizens but also retained Choctaw citizenship. After five years, all federal restrictions were to be removed from such lands. Many Choctaws remained in Mississippi.

In 1918, after a report on the deplorable condition of the Mississippi Choctaws, Congress authorized land acquisition for them at the urging of Senator Vardaman and other Mississippi congressmen.[5] An Indian agency of the Bureau of Indian Affairs was established at Philadelphia, Mississippi, and land purchases were made from congressional appropriations over the next several years.[6]

In 1934 Congress enacted the Indian Reorganization Act (IRA), intended to revitalize the tribes. 25 U.S.C. §§ 461-479. 25 U.S.C. § 467 authorizes the Secretary of the Interior to "proclaim new Indian reservations." Purchases were resumed for the Mississippi Choctaws, now made under authority of the IRA. H.Rept. No. 194, 76 Cong., 1st Sess. The Interior Department then proposed and Congress enacted the Act of June 21, 1939, Pub.L. 76-147, 53 Stat. 851 (quoted in the Appendix), which declared that all of the land purchased for the Choctaws in Mississippi since 1918 is held in trust by the United States for the Mississippi Choctaws. An express purpose of the Act was to allow the

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[5] Peterson, the Mississippi Band of Choctaw Indians, doctoral dissertation, Miss. St. U. Library, page 109.

[6] 40 Stat. 573 (1918); 41 Stat. 15 (1919); 41 Stat. 420 (1920); 41 Stat. 1236 (1921); 42 Stat. 570 (1922); 42 Stat. 1191 (1923); 43 Stat. 1149 (1925); 44 Stat. 461 (1926); 44 Stat. 941 (1927); 45 Stat. 206 (1928); 45 Stat. 1568-69 (1929); 46 Stat. 286 (1930); 46 Stat. 1121 (1931).

Mississippi Choctaws to organize a tribal government under Sections 16 and 17 of the IRA, 25 U.S.C. §§ 476 and 477. H.Rept. 194, 76th Cong., 1st Sess., page 3. On December 4, 1944, acting pursuant to 25 U.S.C. § 467 and the 1939 Act just described, the Secretary of the Interior issued a proclamation reciting these land acquisitions and providing that "such lands are hereby declared to be an Indian reservation" for the enrolled members of the Mississippi Band of Choctaw Indians of one-half or more Indian blood. 9 Fed. Reg. 14907 (1944). On May 22, 1945, the Secretary recognized the Mississippi Band of Choctaw Indians as a self-governing tribe pursuant to Section 16 of the IRA, 25 U.S.C. § 476.

THE QUESTIONS ARE SUBSTANTIAL

A. Basis of the Decision Below and Related Cases.

As recited above, Congress in 1939 declared that the Choctaw Reservation lands in Mississippi are held in trust for the Choctaws by the United States, and the Secretary of the Interior in 1944 proclaimed the lands to be an Indian Reservation pursuant to his authority under the IRA, 25 U.S.C. § 467, and under the 1939 special Choctaw statute, 53 Stat. 851, *supra.* Appellants contend that either or both of these acts established these lands as Indian country pursuant to 18 U.S.C. § 1151, which includes all federal Indian reservations and all dependent Indian communities. Appellants further contend that federal court criminal jurisdiction over Indian country pursuant to 18 U.S.C. §§ 1151-1153 and 3242 is exclusive of state court jurisdiction.[7]

[7] *See* cases cited under section H, below.

The court below did not rule on the latter point and based its decision essentially on its conclusion that the Choctaw Reservation is not Indian country. The court relied on a number of alternative theories to support this conclusion, some of which are stated in its opinion in this case, and some of which are made by reference to a prior opinion of the same court in *Tubby* v. *State,* 327 So.2d 272 (Miss. 1976).[8] The court also relied on the opinions of the Fifth Circuit Court of Appeals in *United States* v. *Mississippi Tax Com'n,* 505 F.2d 633 (5th Cir. 1974), *rehearing denied,* 535 F.2d 300 (5th Cir. 1976), *rehearing en banc denied,* 541 F.2d 469 (5th Cir. 1976), although Indian country status was not directly at issue in that case.[9] Appellants here contend that each alternative basis for the ruling that the Choctaw Reservation is not Indian country conflicts with prior governing decisions of this Court or with decisions of other federal courts of appeals.

B. The Court Below Ignored the Most Relevant Decisions of This Court.

On at least two prior occasions, this Court has addressed the question whether Indian country may lawfully be established or re-established in a state after statehood. In both cases the Court sustained the power. *United States* v. *McGowan,* 302 U.S. 535 (1938);

[8] The *Tubby* opinion regarding the Choctaws was technically dictum, because the court reversed Mr. Tubby's conviction on other grounds.

[9] The court ruled that the entity being taxed was a state corporation rather than the Tribe or an Indian, and this was the first basis for the Fifth Circuit's decision. 505 F.2d at 638. The court's second ground was that jurisdiction was precluded by 28 U.S.C. § 1341. *Id.* The discussion of tribal status was thus either an alternate holding or, more properly, obiter dictum.

Donnelly v. *United States,* 228 U.S. 243 (1913). These cases were argued to the court below in this case and in *Tubby* v. *State, supra,* but the court failed to address them.[10] The *McGowan* decision indicates that far less federal action than is found here is sufficient to establish Indian country. *See also, United States* v. *Sandoval,* 231 U.S. 28, 48 (1913); F. Cohen, *Handbook of Federal Indian Law* (GPO 1942) pages 7, 359.

More recently the Court in *Antoine* v. *Washington,* 420 U.S. 194 (1975), held that Indian hunting rights dependent on post-statehood federal action are valid despite the lack of state consent. 420 U.S. at 200-05.

C. Re-Establishment of Indian Country Is Not Precluded by the Treaty of Dancing Rabbit Creek.

The court below ruled that the Treaty of Dancing Rabbit Creek (7 Stat. 333) "cannot be altered by an Act of Congress; . . ." 347 So.2d at 962.[11] This is plainly contrary to many decisions of this Court, *e.g., Lone Wolf* v. *Hitchcock,* 187 U.S. 553 (1903). Furthermore, there is no language in the Treaty that conflicts with the 1944 IRA proclamation or with the 1939 Act of Congress taking lands in trust for the Choctaws.

D. Citizenship of the Indians Is Irrelevant.

The court below lays particular stress on the fact that the Mississippi Choctaws are citizens. However, this Court has repeatedly ruled that citizenship is not inconsistent with federal guardianship and Indian

[10] The cases were also cited and argued to the Fifth Circuit in United States v. Mississippi Tax Com'n, *supra.* That court also ignored these cases.

[11] The Fifth Circuit said this too. 535 F.2d at 302.

country jurisdiction. *McClanahan* v. *Arizona Tax Com'n,* 411 U.S. 164, 172-73 (1973); *Creek County* v. *Seber,* 318 U.S. 705, 718 (1943); *Tiger* v. *Western Investment Co.,* 221 U.S. 286, 310-13 (1911); *United States* v. *Celestine,* 215 U.S. 278 (1909). The precise point of the court below was rejected in *Apapas* v. *United States,* 233 U.S. 587 (1914). This case was cited to the court below but ignored by it.

E. Tribal Status Is Irrelevant.

The court below also ruled that the Mississippi Choctaws are not lawfully an Indian tribe and that this precludes federal authority. This was clear error for two reasons. First, Indian country jurisdiction pursuant to 18 U.S.C. §§ 1151-53 and 3242 does not depend on whether there is a separate tribal entity, as this Court has implicitly recognized in a number of cases, *e.g., United States* v. *Pelican,* 232 U.S. 442 (1914); *United States* v. *Ramsey,* 271 U.S. 467 (1926); *United States* v. *McGowan, supra.* The statutes require only that the accused be an Indian, and the place of the offense charged be Indian country.

Second, this Court has held that when tribal recognition is relevant, it is normally a political question committed to Congress and the Executive Branch and not subject to judicial review. *United States* v. *Holliday,* 70 U.S. (3 Wall.) 407 (1865); *Cf., Baker* v. *Carr,* 369 U.S. 186, 282 (1962). Here the Executive Branch has recognized the Mississippi Choctaws as a tribe entitled to self-government under the IRA Section 16, 25 U.S.C. § 476.

F. The Interpretation of the Indian Reorganization Act by the Court Below Is Erroneous, and There Is a Conflict between Federal Circuit Courts of Appeals.

The court below ruled that the Secretary of the Interior lacked authority to proclaim the Choctaw lands to be an Indian reservation pursuant to Section 7 of the IRA, 25 U.S.C. § 467, because that Act does not apply to the Mississippi Choctaws. Appellants contend that this interpretation is at odds with the plain language of the Act, particularly 25 U.S.C. § 479 defining Indians, and it fails to take into account the special Choctaw statute of 1939, 53 Stat. 851, *supra*.

The Fifth Circuit arrived at the same conclusion. 535 F.2d at 304-06. This position is in direct conflict with the decision of the District of Columbia Circuit in *Maynor* v. *Morton*, 510 F.2d 1254 (D.C. Cir. 1975).

G. The Arsenals and Dockyards Clause Is Inapplicable.

In its earlier decision in *Tubby* v. *State*, *supra*, the court below ruled that federal authority is precluded by the lack of state consent under the Arsenals and Dockyards Clause, U.S. Const. art. I, § 8, cl. 17. 327 So.2d at 281-84. However, this Court has repeatedly ruled that federal authority over Indian affairs does not derive from that clause. *E.g.*, *Moe* v. *Confederated Salish & Kootenai Tribes*, 425 U.S. 463, 481 n.17 (1976). In *United States* v. *McGowan*, 89 F.2d 201, 202 (9th Cir. 1937), the Ninth Circuit ruled that federal Indian jurisdiction was precluded by the Arsenals and Dockyards Clause, but this Court unanimously reversed, *United States* v. *McGowan*, 302 U.S. 535 (1938). *See also*, *Antoine* v. *Washington*, *supra*, 420 U.S. at 200-05; L.Davis, *Jurisdiction over Indian Country*, I Ariz.L.Rev. 62, 65 (1959).

H. Federal Jurisdiction Is Exclusive.

This Court has repeatedly ruled that absent consent of Congress, the federal criminal jurisdiction in Indian country exercised pursuant to 18 U.S.C. §§ 1151-53 and 3242 is exclusive of state jurisdiction. *Seymour* v. *Superintendent*, 368 U.S. 351 (1962); *United States* v. *Kagama*, 118 U.S. 375 (1886); *see*, *DeCoteau* v. *District County Court*, 420 U.S. 425, 427 n.2 (1975). There is no applicable consent here. Mississippi has not complied with Public Law 280, 67 Stat. 589 (1953), *as amended*, 25 U.S.C. §§ 1321-1326. *Cf.*, *Kennerly* v. *District Court*, 400 U.S. 423 (1971).

I. The Issues Are Important.

The decisions of the court below in this case and in *Tubby* v. *State*, *supra*, and the Fifth Circuit's alternate holdings and/or dicta in *United States* v. *Mississippi Tax Com'n*, *supra*, have generated great confusion in the administration of Choctaw Indian affairs. The prolonged double prosecution in this case is only one of numerous problems. Choctaw Indians have been prosecuted in the past by the federal government and are incarcerated in federal institutions; numerous federal convictions are drawn into question. The status of an Indian reservation established by Congress and of an Indian band recognized by the United States has been clouded by judicial fiat. Grave uncertainty over federal benefits now provided the Mississippi Choctaws has arisen.

Furthermore these decisions involve legal principles that frequently arise in the administration of Indian affairs nationally, such as the interpretation of Indian Reorganization Act and alleged limitations on federal authority.

CONCLUSION

The decision of the court below is plainly in conflict with numerous decisions of this Court, and it should be reversed.

Respectfully submitted,

RICHARD B. COLLINS
NATIVE AMERICAN RIGHTS FUND
1506 Broadway
Boulder, Colorado 80302
Telephone: 303/447-8760

EDWIN R. SMITH
Box 467
Philadelphia, Mississippi 39350
Telephone: 601/565-5251

Counsel for Appellants

October 1977

APPENDIX

APPENDIX

A. Statutes Involved

Mississippi Code Annotated (Supp. 1976)

§ 97-3-7. Simple assault—aggravated assault.

* * * * *

(2) A person is guilty of aggravated assault if he (a) attempts to cause serious bodily injury to another, or causes such injury purposely, knowingly or recklessly under circumstances manifesting extreme indifference to the value of human life; or (b) attempts to cause or purposely or knowingly causes bodily injury to another with a deadly weapon or other means likely to produce death or serious bodily harm; and, upon conviction, he shall be punished by imprisonment in the county jail for not more than one (1) year or in the penitentiary for not more than twenty (20) years. Provided, however, a person convicted of aggravated assault upon a law enforcement officer or fireman while such law enforcement officer or fireman is acting within the scope of his duty and office shall be punished by a fine of not more than five thousand dollars ($5,000.00) or by imprisonment for not more than thirty (30) years, or both.

Act of June 21, 1939, Public Law 76-147, 53 Stat. 851

[CHAPTER 235]

AN ACT

To define the status of certain lands purchased for the Choctaw Indians, Mississippi.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That title to all lands purchased by the United States for the benefit of the Choctaw Indians of Mississippi, under authority contained in the Act of May 25, 1918 (40 Stat. L., 573), and similar subsequent Acts, not under contract for resale to Choctaw Indians, or on which existing con-

tracts of resale may hereafter be canceled, is hereby declared to be in the United States in trust for such Choctaw Indians of one-half or more Indian blood, resident in Mississippi, as shall be designated by the Secretary of the Interior.

Approved, June 21, 1939.

25 U.S.C. § 467

§ 467. New Indian reservations

The Secretary of the Interior is hereby authorized to proclaim new Indian reservations on lands acquired pursuant to any authority conferred by sections 461, 462, 464, 465, 466-470, 471-473, 474, 475, 476-478, and 479 of this title or to add such lands to existing reservations: *Provided,* That lands added to existing reservations shall be designated for the exclusive use of Indians entitled by enrollment or by tribal membership to residence at such reservations. June 18, 1934, c. 576, § 7, 48 Stat. 986.

25 U.S.C. § 479

§ 479. Definitions

The term "Indian" as used in sections 461, 462, 463, 464, 465, 466-470, 471-473, 474, 475, 476-478, and 479 of this title shall include all persons of Indian descent who are members of any recognized Indian tribe now under Federal jurisdiction, and all persons who are descendants of such members who were, on June 1, 1934, residing within the present boundaries of any Indian reservation, and shall further include all other persons of one-half or more Indian blood. For the purposes of said sections, Eskimos and other aboriginal peoples of Alaska shall be considered Indians. The term "tribe" wherever used in said sections shall be construed to refer to any Indian tribe, organized band, pueblo, or the Indians residing on one reservation.

The words "adult Indians" wherever used in said sections shall be construed to refer to Indians who have attained the age of twenty-one years. June 18, 1934, c. 576, § 19, 48 Stat. 988.

B. Opinion Below

Smith JOHN and Harry John

v.

STATE of Mississippi.

No. 49682.

Supreme Court of Mississippi.

May 11, 1977.

Rehearing Denied July 20, 1977.

Edwin R. Smith, Philadelphia, for appellant.

A. F. Summer, Atty. Gen., by Catherine Walker Underwood, Special Asst. Atty. Gen., Jackson, for appellee.

Before PATTERSON, SUGG and WALKER, JJ.

SUGG, *Justice,* for the Court:

The defendants, Smith John and Harry John, were convicted of aggravated assault and sentenced by the Circuit Court of Leake County to serve two years in the penitentiary.[1]

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[1] The judgment of the circuit court was entered May 7, 1976 and each defendant was given credit on the sentence for eight months and eight days time served in jail. The crime for which defendants were convicted occurred on August 30, 1975 and apparently they were detained in jail from the time of their arrest following the commission of the crime until they filed an appearance bond in connection with their appeal to this Court on May 10, 1976.

The primary question is one of jurisdiction between the United States District Court and the Circuit Court of Leake County, Mississippi. Did the United States District Court have jurisdicton to try the defendants under the Major Crimes Act, 18 U.S.C.A. § 1153, or did the Leake County Circuit Court have jurisdiction to try the defendants under Mississippi Code Annotated section 97-3-7(2) (Supp.1976). Both courts could not have jurisdiction because the prosecution in each was based on the same acts of the defendants.

The errors assigned are: (1) The trial court erred in failing to sustain defendants' motion to dismiss after their prosecution in United States District Court resulted in a conviction of simple assault based on the same incident which resulted in their conviction in the Circuit Court of Leake County. (2) The trial court erred in denying defendants' plea of former jeopardy because they had been convicted in United States District Court for the same act. (3) The trial court erred in subjecting defendants to trial following their trial in United States District Court because their trial in the state court constituted invidious racial discrimination.

Defendants were convicted of simple assault in the United States District Court for the Southern District of Mississippi for violating 18 U.S.C.A. § 113 and were sentenced to serve ninety days and to pay a fine of $300.

Federal custody over the defendants was obtained through a habeas corpus ad prosequendum. Defendants' brief states that the defendants' misdemeanor conviction in the United States District Court has been appealed to the Fifth Circuit Court of Appeals. They contend that unless and until the United States District Court's conviction is overturned the state has no right to proceed with its prosecution on the indictments in the state court.

The United States District Court's judgment of conviction was entered December 15, 1975 before our decision in *Tubby* v. *State*, 327 So.2d 272 (Miss.1976) and before the decision of the Fifth Circuit Court of Appeals in *United States of America et al.* v. *State Tax Commission of State of Mississippi et al.*, 535 F.2d 300 (5th Cir. 1976).[2]

Tubby, supra, involved the conviction of a Choctaw Indian for arson for burning a house owned by another Choctaw Indian located on land purchased for the Choctaw Indians with trust funds held by the United States. We held in *Tubby* that Mississippi has criminal jurisdiction over all crimes committed by Choctaw Indians within this state because: (1) "Indian County" within Mississippi was extinguished by land patents issued to the individual Choctaw Indians under the terms of the Treaty of Dancing Rabbit Creek. (2) All Choctaw Indians residing within Mississippi have been made citizens of the state by terms of the Treaty of Dancing Rabbit Creek, by amendment to the Mississippi Constitution, and by Mississippi statutes. (3) The Choctaw Indians of Mississippi do not fall within the provisions of the Federal Indian Reorganization Act granting certain rights of home rule to Indians because they gave up their status as reservation Indians and became citizens of Mississippi before the enactment of the Indian Reorganization Act, §§ 1 et seq., 25 U.S.C.A. §§ 461 et seq. (4) Choctaw Indians became subject to Mississippi law when the United States Government issued patents to their land. (5) The courts of Mississippi have jurisdiction of Choctaw Indian citizens in the same manner and to the same extent that they have jurisdiction over other citizens of Mississippi.

Although the decision of the Fifth Circuit Court of Appeals in *United States* v. *State Tax Commission*, 535 F.2d

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[2] See decision of three judge panel in *United States of America et al.* v. *State Tax Commission of State of Mississippi et al.*, 505 F.2d 633 (5th Cir. 1974).

300 (5th Cir. 1976) involved a tax question, the holding is persuasive on the issues involved in this case. The Fifth Circuit held:

> After the ratification of the Treaty of Dancing Rabbit Creek the Choctaw Indians who chose to remain in Mississippi were no longer an Indian Tribe, they were citizens of Mississippi, and they most assuredly were not wards of the United States. The only way they could reassume Choctaw tribal citizenship was to move to the Indian Territory.
>
> As cited in the original opinion, a thorough discussion of this situation was authored by Mr. Justice Pitney in *Winton* v. *Amos*, 255 U.S. 373, 41 S.Ct. 342, 344, 65 L.Ed. 684 (1921). That opinion of the Supreme Court sets forth in interesting detail the many *unsuccessful* efforts of the Mississippi Choctaws to reassume Choctaw citizenship without moving to the Indian Territory. See, also, *Choctaw Nation* v. *United States*, 119 U.S. 1, 7 S.Ct. 75, 30 L.Ed. 306 (1886).
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> In any event, this Treaty was made by and between the Tribe and the United States and both were bound by its terms. By remaining and accepting (or claiming later, as some did) the lands allotted to those who wished to stay, the individual Indian likewise bound himself to the provisions of the Treaty.
>
> The Treaty of Dancing Rabbit is a part of the Supreme Law, United States Constitution, Article 6, Clause 2, and it cannot be altered by an Act of Congress, Congress cannot obliterate the jurisdiction of Mississippi over its citizens.
>
> This case simply does not fit into the extensive jurisprudential grooves developed with reference to Indian wards or those Indian Reservations which

> were established either by Treaty or created by Congress for those who never converted their Indian status to that of state citizenship.
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> The Choctaw Indians of Mississippi do not live in Indian country. Except for that land patented to individual Indians under the terms of the Treaty (and not in trust) the Tribe sold all of its land to the United States in 1830. By 1850 virtually every acre of it had been patented to private purchasers by virtue of sales at the Land Offices in Columbus and Paulding. See *DeCoteau* v. *District County Court for Tenth Judicial District*, 1975, 420 U.S. 425, 95 S.Ct. 1082, 43 L.Ed2d 300. See also, *Dillon* v. *Antler Land Company of Wyola*, 9 Cir. 1974, 507 F.2d 940, *cert. denied*. 421 U.S. 992, 95 S.Ct. 1998, 44 L.Ed.2d 482.
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> We adhere to the view originally entertained that the definition of the term "Indian" appearing in Section 19 in no way altered or amended the description of those entitled to organize under the terms of Section 16.
>
> We also adhere to the opinion that:
>
> (1) The Choctaw Indians residing in Mississippi in 1934 were not members of an Indian tribe. The tribe was in Oklahoma. The tribal status of the Mississippi Choctaws had been permanently extinguished by the 1830 Treaty of Dancing Rabbit Creek;
>
> (2) Granting that Section 7 of the 1934 Act authorized the Secretary of the Interior to set up new Indian reservations, we think that the clear intent of Congress was to legislate for Indian tribes, not for individual Indians;
>
> (3) We see nothing in the Acts of Congress conferring authority upon the Secretary of the Interior

to create Indian tribes where none had theretofore existed. Under Section 16 only a tribe could organize for self-government, etc. Additionally, we think the purpose was to give the tribes some independence from the Bureau of Indian Affairs;

(4) Nothing in the various Congressional enactments indicates a desire or purpose to abrogate the Dancing Rabbit Treaty;

(5) Nothing in the various Congressional enactments indicates a desire or purpose to oust Mississippi of its jurisdiction over those who had been its citizens, so declared by Treaty, for over a hundred years.

Consequently, we are of the opinion that the jurisdiction of the State of Mississippi over its citizens of Choctaw Indian blood stands unimpaired. (535 F.2d at 302, 306).

In view of *Tubby* and *United States* v. *State Tax Commission, supra,* we are of the opinion that the United States District Court had no jurisdiction to proceed with the prosecution of the defendants under 18 U.S.C.A. §1153 (Supp.1976).

In their second assignment of error defendants argue that they have been subjected to double jeopardy because they were convicted in the United States District Court under 18 U.S.C.A. §1153 and under Mississippi Code Annotated section 97-3-7(2) (Supp.1976) for the same act. The argument is without merit because former jeopardy does not exist unless the previous trial was before a court of competent jurisdiction. It has long been settled in this state that a party who has been tried and convicted by a court not having jurisdiction of the offense cannot plead former jeopardy if subsequently indicted for the same offense in a court having jurisdiction thereof. *Montross* v.

State, 61 Miss. 429 (1883). We do not find any case in which the United States Supreme Court has addressed this question and none was cited in the briefs. However, the federal courts in the various circuits adhere to the rule expressed in *Montross, supra.* See cases annotated in West Federal Practice Digest, *Criminal Law,* Key 167. In 22 C.J.S. *Criminal Law* §244 at 643-644 (1961) the general rule is stated as follows:

> Former jeopardy does not exist unless the previous trial was before a court of competent jurisdiction, and a judgment void for lack of jurisdiction is not a bar to a subsequent prosecution for the same offense. The court in which the prior acquittal or conviction was obtained must have been one having jurisdiction of the offense charged and also of accused, obtained by due process based on legal proceedings. However, the judgment of a court having jurisdiction is a bar to a subsequent prosecution for the same offense, even though the judgment is erroneous and voidable, or the court erred in exercising a discretion vested in it. The fact that a court having jurisdiction when the trial starts thereafter loses it by rendering judgment thereon on Sunday does not change the fact that accused had been placed in jeopardy. Where accused procured a prior conviction to be set aside on the ground that the court was without jurisdiction, he is estopped subsequently to assert, in support of a defense of previous jeopardy, that such court had jurisdiction.

The trial of defendants in the Leake County Circuit Court following a trial in the United States District Court did not amount to double jeopardy because the United States District Court did not have jurisdiction of the crime with which defendants were charged.

Defendants' third assignmnt of error is that their trial in state court constituted invidious racial discrimination and in their brief state the following:

> Artis Jenkins, the victim of the allegedly unlawful assault which gave rise to both the state and the federal prosecutions, was a non-Indian. Both Smith John and his son, Harry Smith John, are full-blooded Choctaw Indians. The incident took place upon lands which are Indian country under federal law. As Indians accused of one of the crimes enumerated under the Major Crimes Act, Defendants were subjected to trial in federal court. 25 U.S.C. 1153; 18 U.S.C. 3242 Had the Defendants instead been non-Indians, they would have been subject only to state court jurisdiction. Clearly, then, if jurisdiction were found to be vested over defendants Smith and Harry Smith John so as to permit the state and the federal courts to proceed against them, they could be tried a second time for their assault against Artis Jenkins only because of their race. Subjection of the defendants to a second, state trial, therefore, is violative of the provisions of the Fifth and Fourteenth Amendments to the Constitution of the United States, in that it is invidious discrimination based upon race. So fundamental and self-evident is the proposition that it requires no further supporting authorities.

The fallacy of defendants' argument is that the United States District Court had no jurisdiction to try them under Major Crimes Act, 18 U.S.C.A. § 1153. There is no Indian country in Mississippi, the defendants are citizens of Mississippi subject to its laws, and therefore are subject to prosecution in its courts. Defendants stated in their brief that their conviction in the United States District Court has been appealed to the Fifth Circuit Court of Appeals. If the Fifth Circuit should hold that the United States District Court had jurisdiction under 18 U.S.C.A. § 1153 and affirm their conviction a conflict in decisions between the Fifth Circuit and this Court would result. This conflict could then be properly resolved in the United States Supreme Court.

The defendants are in the same position as any other defendant, regardless of race or color, who has been tried for a crime by a court which had no jurisdiction. We therefore reject this argument of defendants that they are victims of invidious racial discrimination because of their prosecution in the state court.

AFFIRMED.

GILLESPIE, C.J., PATTERSON and INZER, P. JJ., and SMITH, ROBERTSON and BROOM, J.J., *concur.*

WALKER, J., *specially concurs.*

LEE, J., *took no part.*

WALKER, *Justice, specially concurring.*

In view of this Court's holding in *Tubby* v. *State*, 327 So.2d 272 (Miss.1976), I concur. However, I am still of the opinion that *Tubby* was erroneously decided.